1383 EMPLOYER NEGLIGENCE: NEGLIGENT HIRING, TRAINING, OR SUPERVISION

In this case, (plaintiff) claims (defendant)'s employee, (employee's name), engaged in conduct that injured (him) (her). (Plaintiff) further claims that (defendant) was negligent in the (hiring) (training) (supervision) of (defendant's employee).

Question 1 asks you to determine whether the (defendant's employee) [was negligent (describe the alleged act or failure to act)] [describe the alleged intentional tort, e.g., committed a battery] [describe the alleged wrongful act that violates public policy]. [Insert here an appropriate instruction covering the wrongful act, whether it be a (1) negligent tort, (2) an intentional tort, or (3) a violation of public policy as evidenced by existing statutory law.]

Question 2 asks whether the (conduct) (negligence) of (defendant's employee) was a cause of the (accident) (injury to the (plaintiff)). If you are required to answer this question, you must consider whether there was a causal connection between the (conduct) (negligence) of (defendant's employee) and the (accident) (injury to the (plaintiff)). [The question does not inquire about "the cause" but rather "a cause." The reason for this is that there may be more than one cause of an (accident) (injury). The negligence of one person may cause an (accident) (injury to the (plaintiff)) or the combined negligence of two or more persons may cause it.] Before you find that the (accident) (injury) was caused by (defendant's employee)'s (conduct) (negligence), you must find that this (conduct) (negligence) was a substantial factor in producing the (accident) (injury to (plaintiff)).

Question 3 asks whether (defendant) was negligent in (hiring) (training) (supervising) (employee). An employer is required to use ordinary care in (hiring) (training) (supervising) its employees. Ordinary care is the care which a reasonable person would use in similar circumstances. An employer is not using ordinary care and is negligent, if the employer, without intending to do harm, does something (or fails to do something) with respect to the (hiring) (training) (supervision) of an employee that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property from the employees conduct.

Question 4 asks whether the negligence of (defendant) was a cause of the (conduct) (negligence) of (defendant's employee). If you are required to answer this question, you must consider whether there was a causal connection between (defendant)'s negligence and the (conduct) (negligence) of (employee) which in turn was a cause of the (accident) (injury to (plaintiff)). [The question does not inquire about "the cause" but rather "a cause." The reason for this is that there may be more than one cause of the employee's (negligence) (conduct). The negligence of one person may cause the employee's (negligence) (conduct) or the combined negligence of two or more persons may cause it.] Before you find that (defendant)'s negligence was a cause of (employee)'s (conduct) (negligence), you must find that the negligence was a substantial factor in producing the (accident) (injury to (plaintiff)).

SPECIAL VERDICT

1. [**Committee Note to Trial Judge**: This question requires the jury to determine whether the alleged wrongful act was committed by the employer's employee. The question will be adapted to whether the alleged wrongful conduct is a negligent tort, an intentional tort, or a violation of public policy evidenced by existing statutory law. If the evidence raises a jury question regarding the employee's negligence, the question might be: Was (defendant)'s employee negligent on (date)? If the alleged wrongful act

is an intentional tort, the question might be: Did (defendant's employee) commit a battery on (date)? If the court has had to make a legal determination of the public policy behind a statute, the question might be: Did (defendant's employee) (fail to) (describe the act or omission which if proved would violate public policy)?]

Answer:_____
Yes or No

2. If you have answered question 1 "yes," then answer this question. Otherwise do not answer it. Was the (conduct) (negligence) of (defendant's employee) a cause of injury to (plaintiff)?

Answer:_____
Yes or No

3. If you have answered question 2 "yes," then answer this question. Otherwise do not answer it. Was (defendant) negligent in the (hiring) (training) (supervision) of (employee)?

Answer:_____
Yes or No

4. If you have answered question 3 "yes," then answer this question. Otherwise do not answer it. Was such negligence of (defendant) a cause of the (conduct) (negligence) of (defendant's employee) on (date)?

Answer:_____
Yes or No

5. [If the evidence indicates the contributory negligence of plaintiff was a cause of injury, then insert negligence and cause questions as to the plaintiff.]

6. [Negligence comparison question for all parties found causally negligent.]

7. What sum of money will fairly and reasonably compensate (plaintiff) for the injuries sustained as a natural and probable consequence of the incident on (date) with respect to:

a. Past pain, suffering, and disability $_____

b. Other subparts as required by the evidence $_____

COMMENT

This instruction was approved by the Committee in 1999. The comment was updated in 2010, 2014, 2018, and 2019.

Wrongful Act by Employee. The Committee has substituted "conduct" for "wrongful act" out of concern that a jury might be inclined to make its own determination of what "conduct" is "wrongful." The Miller court has defined this term as follows:

> . . . While we stop short of requiring an underlying tort, we do conclude that there must be an underlying wrongful act committed by the employee as an element of the tort of negligent hiring, training or supervision. A wrongful act may well be a tort, but not necessarily. If the act of the employee is contrary to a fundamental and well-defined public policy as evidenced by existing statutory law, it is sufficient.

Miller v. Wal-Mart Stores, Inc., 219 Wis.2d 250, 263, 580 N.W.2d 233 (1998). Whether employee "conduct" occurred is a question of fact for the jury. Thus, where the evidence indicates the employee may have committed a tort, the elements of the tort should be submitted for jury determination.

However, if the evidence raises a question of violation of "fundamental and well-defined public policy as evidenced by existing statutory law," there may be a threshold question of law presented for court determination: what is the fundamental and well-defined public policy in the statute? After the court has decided this question, the jury may be asked whether the employee did or failed to do what was required by the public policy.

Negligent Hiring, Training, or Supervision Distinguished from Respondeat Superior. ". . . (W)ith a vicarious liability claim, an employer is alleged to be vicariously liable for a negligent act or omission committed by its employee in the scope of employment. See Shannon v. City of Milwaukee, 94 Wis.2d 364, 370, 289 N.W.2d 564 (1980). . . . (V)icarious liability is based solely on the agency relationship of a master and servant. In contrast, with a negligent supervision claim, an employer is alleged to be liable for **a negligent act or omission it has committed** in supervising its employee. Therefore, liability does not result solely because of the relationship of the employer and employee but instead because of the independent negligence of the employer." (Emphasis in original.) L.L.N. v. Clauder, 209 Wis.2d 674, 698-99 n.21, 563 N.W.2d 434 (1997). Also see Doyle v. Engelke, 219 Wis.2d 277, 291 n. 6, 580 N.W.2d 245 (1998).

When a negligent supervision claim rests solely on an employee's intentional and unlawful act, such as assault and battery, without any separate basis for a negligence claim against the employer, no coverage exists. Accordingly, a negligent supervision claim can qualify as an occurrence only if facts exist showing that the employer's own conduct accidently caused plaintiff's injuries. See Talley v. Mustafa, 2018 WI 47, 381 Wis.2d 393, 423, 911 N.W.2d 55 (2018).

Causation. "With respect to a cause of action for negligent hiring, training, or supervision, we determine that the causal question is whether the failure of the employer to exercise due care was a cause-in-fact of the wrongful act of the employee that in turn caused the plaintiff's injury. In other words, there must be a nexus between the negligent hiring, training, or supervision and the act of the employee. This requires two questions with respect to causation. The first is whether the wrongful act of the employee was a cause-in-fact of the plaintiff's injury. The second question is whether the negligence of the employer was a cause-in-fact of the wrongful act of the employee." Miller v. Wal-Mart Stores, supra at 262. See also Hansen v. Texas Roadhouse, Inc., 2013 WI App 2, 345 Wis.2d 669, 827 N.W.2d 99.

If the jury finds employee negligence in question 1, there may be situations where the evidence raises a jury question as to whether the negligent conduct of others (including the plaintiff) may also be a cause of plaintiff's injuries. In such cases, the bracketed section in the third and fifth paragraphs may be appropriate. The jury would determine whether the negligence was causal and if so, answer a comparison question.

Negligence Comparison. Where the jury finds causal negligence on the part of the employee, current case law allows recovery from "any of several parties whose negligence combined to cause the injury and also permits the operation of comparative-negligence principles for the allocation of negligence between joint tortfeasors." Mulder v. Acme-Cleveland Corp., 95 Wis. 2d 173, 178, 290 N.W.2d 276 (1980), citing Bielski v. Schulze, 16 Wis.2d 1, 114 N.W.2d 105 (1962). The Committee believes that the causal negligence, if any, of the plaintiff, employer, and employee should be compared under Wis. Stat. § 895.045. The parties should be treated as concurrent rather than successive tortfeasors.

There is a potential for juror confusion in comparing the causal negligence of the plaintiff, the employee, and the defendant employer. The jury is being asked to compare negligence which was a cause of the accident or injury to the plaintiff with negligence which was a cause of the employee's conduct (which was a cause of the accident or injury to the plaintiff). However, the language of the Miller court cited above clearly indicates this approach is to be followed.

Where the jury finds that employee's wrongful act is an intentional tort and further finds employer negligent, both would be jointly liable to the plaintiff. However, negligence-comparison principles would not allow their conduct to be compared. Crest Chevrolet- Oldsmobile-Cadillac, Inc. v. Willemsen, 129 Wis.2d 129, 151, 384 N.W.2d 692 (1986), Schulze v. Kleeber, 10 Wis.2d 540, 545, 103 N.W.2d 560 (1960).

Contribution and Indemnification: A negligent tortfeasor may have a claim for indemnification against an intentional tortfeasor should their concurrent conduct produce damage or injury. Fleming v. Threshermen's Mutual Insurance Company, 131 Wis.2d 123, 388 N.W.2d 908 (1986). An intentional tortfeasor is not entitled to contribution from a negligent tortfeasor. Imark Industries, Inc. v. Arthur Young & Company, 148 Wis.2d 605, 436 N.W.2d 311 (1989), reversing in part and remanding 141 Wis.2d 114, 414 N.W.2d 57 (Ct. App. 1987).

Comparison. There is no comparison under the comparative negligence statute (§ 895.045) between intentional and negligent tortfeasors. Fleming, supra. For a sample verdict, see JI-Civil 1580.

Cases Involving Joint Tortfeasors and Intentional and Negligent Conduct. Where the jury finds that employee's wrongful act is an intentional tort and further finds employer negligent, both would be jointly liable to the plaintiff. However, negligence-comparison principles would not allow their conduct to be compared. Wis. Stat. 895.045(1) provides only for comparison of negligent conduct. Also see Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen, 129 Wis.2d 129, 151, 384 N.W.2d 692 (1986), Schulze v. Kleeber, 10 Wis.2d 540, 545, 103 N.W.2d 560 (1960).

Also, a negligent tortfeasor may claim indemnification from a joint intentional tortfeasor should their concurrent conduct produce damage or injury. Fleming v. Threshermen's Mutual Insurance Company, et al, 131 Wis.2d 123, 130, 388 N.W.2d 908 (1986). An intentional tortfeasor has no claim for contribution from a joint negligent tortfeasor. Fleming, supra, p. 129, Imark Industries, Inc. v. Arthur Young & Company, 148 Wis.2d 605, 619-620, 436 N.W.2d 311 (1989).

For a sample verdict to use in cases involving intentional and negligent acts of joint tortfeasors, see Wis JI-Civil 1580 (comment).